APPENDICES
TABLE OF CONTENTS

Page

Appendix A:

Order of Court of Appeals Dismissing Petitioners' Notice of Appeal (March 18, 1993).....A1

Appendix B:

Final Judgment of District Court (October 14, 1992).....A4

Appendix C:

Memorandum in Support of Plaintiffs' Motion For Reconsideration (October 1, 1992).....A6

Appendix D:

Transcript of September 30, 1992 Oral Decision of Honorable Sam H. Bell Granting Motions For Directed Verdict.....A23

Appendix E:

Partial Transcript of Proceedings, October 1, 1992.....A27

APPENDIX A

Nos. 92-4306/4320/4373

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SILVER CLOUD, INC., d/b/a Columbiana Plastics; STEPHEN J. MOTOSKO, II, Plaintiffs-Appellees/ Cross-Appellants,	)	ORDER (Filed Mar. 18, 1993)
v.	)	
NATIONAL KITCHEN PRODUCTS; EDWARD J. MORRIS; Defendants-Appellees,	)	
QUIKUT, Division of Scott & Fetzer Company, Defendant-Appellant/ Cross-Appellee.	)	

BEFORE: KENNEDY and NORRIS, Circuit Judges; and CONTIE, Senior Circuit Judge.

The defendant, Quikut, appeals the jury verdict and judgment in favor of the plaintiffs. (Case No. 92-4306). The plaintiff cross-appeals from earlier unfavorable rulings. (Case No. 92-4320). Quikut perfected a second appeal following the district court's disposition of plaintiffs' motion for prejudgment interest. (Case No. 92-4373). Defendant National Kitchen Products, an appellee in Case No. 92-4320, moves to dismiss that appeal on grounds that it was brought while a time-tolling motion

was pending. The plaintiff responds that all three appeals are premature, arguing that a motion to reconsider remains pending in the district court. Both National Kitchen Products and Quikut have replied in opposition to the plaintiff's response. Plaintiff has filed a supplemental response.

During trial of this matter, the district court directed verdict for the defendants on the plaintiffs' antitrust claims. Thereafter, the plaintiff filed a motion to reconsider, asking that those claims be submitted to the jury. The district court later submitted the case to the jury without the antitrust claims. A verdict was rendered for plaintiffs against the remaining defendant on a single count. Before a formal judgment had been entered on the verdict, the plaintiffs made a motion for prejudgment interest. Such a motion tolls the time for appeal. *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989). Both the plaintiffs' appeal in Case No. 92-4320 and defendant Quikut's appeal in Case No. 92-4306 were filed while that motion was pending. Those notices of appeal are ineffective. Fed. R. App. P., 4(a)(4); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (per curiam). Following disposition of the motion, Quikut perfected a second appeal, Case No. 92-4373, but the plaintiffs did not.

Only Case No. 92-4373 vests this court with jurisdiction. The motion to reconsider the directed verdict does not render these appeals premature, as the plaintiffs argue, because the motion was effectively denied when the district court submitted the case to the jury. Further, the motion sought reconsideration of a nonfinal ruling of the district court and not of the final judgment.

It therefore is **ORDERED** that the motion to dismiss Case No. 92-4320 is granted. Further, Case No. 92-4306 is dismissed *sua sponte* as premature. Case No. 92-4373 shall remain upon the court's docket.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

[Only 92-4306/4320
ISSUED AS MANDATE: April 13, 1993

COSTS: None

FILING FEE .....$
PRINTING.....$
TOTAL .....$

APPENDIX B

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT

DISTRICT
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

CASE TITLE
SILVER CLOUD INC., dba COLUMIANA PLASTICS & STEPHEN MOTOSKO, II

V.

NATIONAL KITCHEN PRODUCTS, et al.

DOCKET NUMBER
1:89CV1729
(Filed Oct. 14, 1992)

NAME OF JUDGE ~~OR MAGISTRATE~~
SAM H. BELL

X **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

_ **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that plaintiff recover from defendant Quikut the sum of $70,000.00.

IT IS FURTHER ORDERED that all remaining claims of plaintiff against all defendants are dismissed, with prejudice.

IT IS FURTHER ORDERED that the court's oral opinion of 30 September 1992 is hereby adopted in accordance with Fed. R. Civ. P. 52, and this judgment is hereby entered in accordance with Fed. R. Civ. P. 58, thus terminating this action in its entirety.

/s/ Sam H. Bell
SAM H. BELL, USDC JUDGE

DATE
13 October 1992

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SILVER CLOUD, INC. dba COLUMBIANA PLASTICS and STEPHEN J. MOTOSKO, II Plaintiffs vs. NATIONAL KITCHEN PRODUCTS, ET AL Defendants	CASE NO. 1:89-CV-1729 JUDGE SAM H. BELL MOTION FOR RECONSIDERATION OF THE DIRECTED VERDICT DISMISSING PLAINTIFFS' ANTI-TRUST CLAIMS

Now come Plaintiffs, and hereby move this Court for reconsideration of its decision sustaining Defendants' Motions for Directed Verdicts with respect to the antitrust claims presented herein.

A Memorandum in Support of this Motion, as well as transcripts of pertinent portions of testimony presented at the Trial of this matter, are attached hereto and incorporated herein.

Respectfully Submitted,

/s/ M. Morley
MICHAEL MORLEY - 0021154
Attorney for Plaintiffs
P.O. Box 3965
721 Boardman-Poland Road
Youngstown, Ohio 44513-3965
(216) 726-1654

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SILVER CLOUD, INC. dba COLUMBIANA PLASTICS and STEPHEN J. MOTOSKO, II Plaintiffs vs. NATIONAL KITCHEN PRODUCTS, ET AL Defendants	CASE NO. 1:89-CV-1729 JUDGE SAM H. BELL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE DIRECTED VERDICT DISMISSING ITS ANTITRUST CLAIMS

For the reasons set forth below, Plaintiff respectfully states that the evidence presented at Trial raised more than sufficient issues material to its claims under Sections 1 and 2 of the Sherman Act to require that these claims be submitted to the jury for determination. Specifically, the record contains evidence upon which the jury could find a violation of Section 1 under both a *per se* and "rule of reason" theory of liability.[1]

Accordingly, Plaintiff requests this Court to vacate its order of a directed verdict and allow the jury to enter a verdict on these causes of action.

---

[1] This same evidence would support finding of liability for conspiracy to monopolize in violation of Section 2 of the Sherman Act.

DISCUSSION

A directed verdict should be granted only "if there is a complete absence of pleading or proof on an issue or issues material to the cause of action or where there are no controverted issues of fact upon which reasonable minds could differ." *Rockwell Interim Corp. v. Regional Emergency Medical Services of Northwest Ohio, Inc.*, 688 F. 2nd 29, 31 (6th Cir. 1982). When considering such a motion, a court views the evidence, and inferences therefrom, in a light most favorable to the party against whom the motion was made, "giv[ing] it the advantage of every fair and reasonable inference that the evidence can justify." *Id.*; Also see *Itersh v. United States*, 719 F. 2nd 873, 876-77 (6th Cir. 1983).

When viewed in such a light, the trial record here is replete with evidence from which it can be concluded that Plaintiff's agreement with Quikut was terminated in September of 1985 pursuant to an agreement between Quikut and Morris that violated Section 1 of the Sherman Act.

I. THE RECORD CONTAINS SUFFICIENT EVIDENCE FROM WHICH THE JURY COULD FIND A PER SE VIOLATION OF SECTION 1.

PER SE

Although there is a general presumption for applying the rule of reason in antitrust cases, where the challenged agreement is between *direct competitors* and it results in an allocation of customers or territories, or a reduction in output, it should be properly considered under the *per se*

rule. See, for example, *United States v. Cooperative Theaters of Ohio*, 845 F. 2d 1367, 1371 (6th Cir. 1988), and *See also Palmer v. BRG of Georgia, Inc.*, 111 S. Ct. 401 (1990). *Per se* illegal restraints are conclusively presumed to be unreasonable and illegal without elaborate inquiry of their effect on competition, and proof of market power is not required. *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 432-36 (1990); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344 (1982); and *Lie v. St. Joseph Hospital of Mount Clemens, Michigan*, 1992-1 Trade Cases (CCH) 69,833 (6th Cir. 1992).

The evidence derived at trial showed that at the time Quikut terminated its agreement with Plaintiff, providing for Quikut to be the exclusive distributor of the Motosko slicer, Quikut was a direct competitor, or potential competitor, of Defendant, National Kitchen Products, as distributors* in the sale of manually operated board slicers to pitchmen in the demonstration segment of the retail market. *There is absolutely no dispute in this regard.* Indeed, Edward Ellis testified that one of the reasons he met with Mr. Morris was to determine whether or not Quikut's introduction of a competing manual board vegetable slicer would injure the relationship between Quikut and National Kitchen Products.[2]

---

* See Plaintiffs' Exhibit 13.

[2] A copy of the testimony of Mr. Ellis has not been prepared as of this moment. However, Mr. Ellis' Affidavit dated February 1, 1990 (which was attached to Quikut's original Motion for Summary Judgment) states: "in fact, at one point in time, I visited Ruby Morris at the offices of National Kitchen Products in New York and inquired as to whether the introduction by Quikut of the new slicing machine would hurt the relationship

Accordingly, far more than a scintilla of evidence exists upon which a jury could conclude that any agreement, or concerted action, between Quikut and National Kitchen Products was *horizontal* in nature. It also certainly would be reasonable for a jury to conclude, based on the record facts, that the competitive effect of any agreement between Quikut and National Kitchen Products was a "naked" restraint of trade, and therefore *per se* unlawful, in that it resulted in the effective exclusion of a competitive product from the market. *Palmer v. BRG of Georgia, Inc.*, 111 S. Ct. 401 (1990); *United States v. Topco Associates*, 405 U.S. 596 (1972); *United States v. Cooperative Theaters of Ohio*, 845 F. 2nd 1367 (6th Cir. 1988).

Moreover, although a showing of an unlawful intent is not required to establish a Section 1 claim where a presumptive anti-competitive effect has occurred,[3] the trial record here could also sustain the reasonable conclusion that both Quikut and National Kitchen Products harbored such an intent.

First, Mr. Morris conceded at trial that he complained to Quikut as a result of the presence of the Motosko Slicer at the Philadelphia Home Show in January 1985. Indeed, Morris states that he telephoned Quikut from Philadelphia, and both Stephen Motosko and Charles Motosko

---

between Quikut and Mr. Morris or National Kitchen Products." Mr. Ellis' testimony at the trial of this matter was identical to the testimony in his Affidavit.

[3] *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n. 13 (1978) ("[T]he general rule [is] that a civil violation can be established by proof of *either* an unlawful purpose *or* an anti-competitive effect") (Emphasis added).

testified that, as a result of that telephone call, Quikut forced the Motosko Slicer booth to be closed prior to the beginning of the show. Morris further testified that he complained to Quikut about the Motosko slicer as competition. (See Plaintiffs' Exhibit 1 attached hereto). From such testimony, a jury could *easily conclude that Mr. Morris had an improper anticompetitive motive.*

Further, a jury could conclude an improper motive by Quikut based on its desire to protect its demonstration business, which accounted for, at the time, twenty percent (20%) of its over all business.[4]

As Mr. Morris testified, the pitchmen market is a small close fraternity (See Plaintiffs' Exhibit 2 attached hereto), and Quikut's sales of its knives through this market, by Quikut's own testimony accounted for twenty percent (20%) of its over all sales volume. (See Plaintiffs' Exhibit 3 attached hereto.) Fearful that Morris could prevail on the small fraternity of pitchmen that buying Quikut knives was no longer appropriate, Quikut, it could be inferred, was willing to protect such sales by agreeing to preclude the Motosko slicer from seeing the light of day in the market place. (See testimony of Stephen J. Motosko, attached here to as Plaintiffs' Exhibit 4.)

---

[4] Quikut and National Kitchen Products suggest that the conduct complained of herein makes "no economic sense". Yet, if Quikut truly did not care about the loss of Mr. Morris' demonstration sales purchases, then there would have been no reason for Edward Ellis, the National Sales Manager, to fly to New York City to meet with Mr. Morris to discuss "whether the introduction of the Motosko slicer would hurt the business relationship between Quikut and National Kitchen Products."

Further, David Bryant testified that he feared that "at any point in time any demonstrator should he choose" could have jumped into the knife/demonstrator business in competition with Quikut. (See Plaintiffs' Exhibit 5.)

Finally, and most importantly, Quikut's testimony is that three-fourths (3/4) of its demonstration business comes from its top ten customers, and that eight of those ten sell, among other things, vegetable slicers. Quikut's desire to not compete with those eight demonstrators, who presumably comprise several hundred thousand dollars of demonstrator business, makes enormous *economic* (See Plaintiffs' Exhibit 6 attached hereto.)

* * *

resulting from the complained of conduct. *International Logistics Group, Ltd. v. Chrysler Corporation*, 884 F. 2d 904, 907 (6th Cir. 1989).

RELEVANT MARKET

With respect to proof of the existence of a relevant product *and* geographical market, well established standards were set forth by the United States Supreme Court in *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 325 (1962). There, the High Court stated that "the outer boundaries of a product market are determined by the reasonable interchangeability of use *or* the cross-elasticity of demand between the product itself and substitutes for it." The Court further stated, with respect to the geographical element of the relevant market mandate, that

the definition of a geographical market "must correspond to the commercial realities" of the industry. *Id.* at P. 336.[6]

Interestingly, at Footnote 4 of its initial denial of Defendants' Motions for Summary Judgment, this Court stated, at Page 13 of its Order, that "[i]n reality, Quikut's attack is limited to the first and second prongs of the test; it does not dispute that there exists a relevant market within which the alleged effects would occur."

RELEVANT PRODUCT MARKET

Regarding proof of the relevant product market alleged by plaintiff – manually operated board slicers, with a sub-market of such items sold by demonstrators, all across the United States – Defendants' own testimony may be relied upon. Quikut's witnesses and Mr. Morris testified of their recognition of a specific market segment of sales through pitchmen. This segment of the market was distinct from the general retail segment and others. (See Plaintiffs' Exhibit 7 attached hereto.) Such testimony from participants in the market, even without confirmation from "experts", could be relied upon by the jury in defining the parameters of the relevant market for this case.

Further record evidence assists in this regard. Specifically, facts of record would certainly permit the jury to conclude that a board slicer market is distinct from a

---

[6] Notably, *neither* Defendant offered evidence or argument which could lead the Court to conclude that the geographical market is *anything but the United States.*

market containing a greater number of slicing implements, knives standing alone, for example. Not only did nearly every witness testify how knives and manual board vegetable slicers are distinguished from each other, no genuine effort was engaged upon by either Defendant to convince the jury that the relevant market was anything but manually operated board vegetable slicers.[7]

The *Brown Shoe* test, that the "outer boundaries of a product market are determined by the reasonable interchangeability of use *or* the cross-elasticity of demand between the product itself and substitutes for it", has alone been satisfied by the testimony referred to above as well as by Defendants failure to present any evidence whatsoever that a manual board vegetable slicer can be "interchanged" with any other product. *No evidence in this regard was submitted by Defendants.*

That notwithstanding, the economic testimony in this regard is also consistent with the defining of a separate market, satisfying the "cross-elasticity" option.

Mr. Morris testified that when the Motosko slicer was being sold at the Philadelphia Home Show in January 1986, no effect on his knife sales occurred. Nor did such an effect occur when the price for the Motosko slicer was lowered. (See Plaintiffs' Exhibit 8 attached hereto.) All of

---

[7] While Defendants would have this Court believe that it is unclear what the relevant market is – as they urged at oral arguments on the Motions for a Directed Verdict – there is no genuine dispute in this regard. No evidence exists that knives and vegetable slicers do the same things (indeed, they do not), nor have the Defendants suggested that the relevant market is broader *or* narrower than the market urged by Plaintiffs.

these facts would permit the jury to conclude that there existed a lack of cross-elasticity between knife sales and slicer sales, specifically when sold through pitchmen.

Further, in 1987, the Morris slicer was sold for $10.00. In 1988, after the Motosko Slicer was impacted by Quikut's cut-off, the cost of the Morris slicer was raised to $20.00. Even though the Morris slicer package was enhanced, the driving force of the sale was, of course, the *vegetable slicer.* This increase, if knives and slicers were cross-elastic, would have had people running to buy knives instead of slicers. However, Morris' testimony verifies that his sale of knives through the period of the mid-1980's to the present remained constant, notwithstanding the increase in price for his slicers. (See Plaintiffs' Exhibit 9 attached hereto.)

Such a conclusion would place these products in separate relevant product markets.

GEOGRAPHICAL MARKET

As set forth above geographic markets must be drawn with an eye to the "commercial realities" of the industry. *Brown Shoe Co., supra,* at p. 336. The geographic market is the area of effective competition in which the "seller operates and to which the purchaser can practically turn for supply." *United States v. Philadelphia National Bank,* 374 U.S. 321, 361 (1963).

Thus, to properly define a proper relevant geographical market, one must look at patterns of supply; for example, if there is the same pricing in different markets and shipments are made from disparate locations in the

United States, the evidence would suggest a national market. Moreover, if consumers could switch their purchasing to products from different locations, a national market would be proper, especially in view of the evidence regarding demonstration television sales.[8] Therefore, all of the United States is clearly part of the geographic market because a person can buy a slicer on television as well as any other United States city. Evidence has established that the size of the market is the United States as established by the testimony of Morris and Quikut's David Bryant. (See Plaintiffs' Exhibit 11 attached hereto.) Further, the nature and the method of the sales are undisputedly established as pitch sales by the testimony of Morris, Quikut's David Bryant and Quikut's Marc Nagoshiner. (See Plaintiffs' Exhibit 12 attached hereto.)

Further, Mr. Morris' testimony can be relied upon to conclude that the geographic scope of this relevant market was national. As Mr. Morris testified, there are thousands of home shows, fairs, malls and flea markets across the country at which pitchmen sell items such as slicers. Mr. Morris wholesales to these pitchmen and, he, himself

---

[8] Here, the geographic market is the United States, and the evidence establishes that products are shipped throughout the United States by suppliers. Pricing in the various markets is consistent, and the consumers (without physically traveling) can make purchasing decisions to switch to goods from a geographically distant place. Decision making based on television commercials shown nationally, and infomercials, affects sales at shows, thereby further evidencing a national geographic market. (See Plaintiffs' Exhibit 10 attached hereto.) In other words, competitive realities (i.e., the forces that control supply and demand) are national in scope.

participates in twelve (12) events annually held in disparate geographic locations in Wisconsin, Ohio, Massachusetts, North Carolina, Illinois, Pennsylvania and Michigan. Thus, a national relevant geographical market could certainly be found by the jury, especially when no evidence to the contrary was offered by any of the Defendants.

DEFENDANTS POWER IN THE MARKET

It also could be inferred from the record evidence that National Kitchen Products had market power in the relevant market for the sale of manual board slicers. First, testimony by Stephen Motosko showed that Mr. Morris acknowledged that his sales represented more than 80% of slicers sold during the relevant period. Second, Mr. Morris' market power could also be found on the evidence of his ability to raise the price for his slicer product by 100% after Quikut refused to distribute the Motosko slicer. Such an act is, certainly, indicative of a firm with market power. Thus, even if Defendants' urge a different view of the evidence, which they most certainly will, the Court is not to weigh the evidence, but to determine whether *any* issues exist and when the evidence is viewed most favorably to Plaintiff at a minimum, reasonable minds can certainly differ as to whether Morris had market power.

Finally, while Defendants vaguely suggested during the course of the Trial that there were "several" manual board slicers on the market, it was not until Marc Nagoshiner testified that, based on Quikut's own admissions, this was proven. Mr. Nagoshiner testified that Quikut considered, in approximately 1988, going into the

Slicer business. He stated that, in doing so, Quikut obtained all of the slicers on "the market and there were *only four*. Those four were the National Products' Combi-Chef,[9] the Boerner V-Slicer, and two versions of the Dial-amatic. And, Mr. Morris clearly testified that the V-Slicer was, at that time, distributed by National Kitchen Products (as, of course, was the Combi-Chef) and the Dial-amatic was off of the market. Clearly, this combined testimony, of Morris and Mr. Nagoshiner (the two Defendants' trial repres proves – even without the corroborating testimony which was given – that at the pertinent time period, the *only* manual slicers on the market were those distributed by National Kitchen Products. (See Plaintiffs' Exhibit 13 attached hereto)

ANTI-COMPETITIVE EFFECT

The price increase by National Kitchen Products also permits the inference of an anti-competitive effect in the relevant market, and more than just injury to a competitor. Specifically, whether Mr. Morris can justify the price increase or not based on new packaging and components does not detract from the fact that consumers had to pay twice as much for the same slicer after the Motosko slicer was effectively precluded from entering the market. A lower priced alternative, without the new packaging and components, was not available. Thus, whether consumers

---

[9] The Court will recall that all of Plaintiffs witnesses testified that, in their travels across the United States (which included over 80% of the market), the only manual board slicers on the market were those distributed by National Kitchen Products. See, for example, testimony of Stephen Motosko, Richard Motosko, Richard Reese, James Frenier and Jack Crowther.

wanted just a slicer, or a slicer with new packaging and additional implements, they could only purchase the latter at a price twice as much as was paid for the slicer standing alone. This is exactly the type of anti-competitive effect agreement which the antitrust laws are designed to protect against, and the jury could reasonably find that based on the evidence in the record, such an effect was caused by Defendants' conduct.

Finally, under either a *per se* or rule of reason analysis, the evidence in the record establishes the basis for the jury to find that Quikut and National Kitchen Products acted in concert. The standard this jury would apply would be whether the evidence reasonably tended to prove a conscious commitment to a common scheme designed to achieve an unlawful objective. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984). A formal or express agreement, however, is not required; a tacit understanding is sufficient. *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939). Indeed, even "[a] knowing wink can mean more than words." *Esco Corporation v. United States*, 340 F. 2nd 1000, 1007 (9th Cir. 1985).

As discussed above, both National Kitchen Products and Quikut had the economic motive to agree to exclude the Motosko slicer from the market. As outlined above, if Quikut did not care about the loss of Morris' demonstration sales purchases, then there would be no reason for the National Sales Manager to fly to New York City to meet with Mr. Morris to discuss whether the introduction of the Motosko slicer would hurt Quikut's business relationship with Morris. Moreover, David Bryant's fear that any demonstrator could have jumped into the knife/

demonstration business in competition with Quikut coupled with the fact that Mr. Morris was one of the top 3 knife purchasers, substantiates the magnitude of the economic ramifications. (See previous Plaintiffs' Exhibit 5.) This reality is coupled with the statistic that three-fourths of Quikut's demonstration business comes from its top ten customers, eight of which sell, among other things, vegetable slicers. This translates into potentially losing approximately $750,000 dollars of demonstrator business and makes enormous *economic sense*. (See previous Plaintiffs' Exhibit 6).

Moreover, the record contains significant evidence of communications between the Defendants, including Mr. Morris and Quikut's National Sales Manager, which were then followed by Plaintiff being told by Quikut not to show the Motosko slicer at the Philadelphia Home Show, and ultimately by Quikut's refusal to distribute the Motosko slicer to the demonstration market. For purposes of this Motion, such evidence should be sufficient to permit the jury to decide Plaintiff's claim under Section 1 of the Sherman Act.

In addition to evidence of conspiratorial conduct discussed above, attached hereto as Plaintiffs' Exhibit 14, is a segment of Stephen Motosko's testimony in which Mr. Morris provided him with an "example" of how he deals with his buyers and how Quikut "protects" him [Morris] in the same way. This testimony is explicit, and, notably, it was not disputed by Morris.[10]

---

[10] This statement by Morris is accurate. Otherwise, the denial would have been impeached with the use of audio tape recordings, as previously authorized by the Court.

III. SUFFICIENT EVIDENCE IS IN THE RECORD TO RAISE ISSUES ON PLAINTIFFS' CONSPIRACY TO MONOPOLIZE CLAIM

The same evidence as compels allowing the jury to decide Plaintiff's Sherman Act Section 1 claim, also requires that the jury should be permitted to render a verdict on its conspiracy to monopolize claim under Section 2 of the Sherman Act. The elements of this cause of action are concerted activity, specific intent to monopolize and an overt act done in furtherance of the conspiracy. *Advanced Health Care Services, Inc. v. Radford Community Hospital*, 910 F. 2nd 139, 150 (4th Cir. 1990); *Volvo North American Corporation v. Men's Inter. Professional Tennis Council*, 857 F. 2nd 55, 74 (2nd Cir. 1988); *Dreiling v. Puegot Motors of America, Inc.*, 850 F. 2nd 1373, 1382 (10th Cir. 1988); *Great Escape, Inc. v. Union City Body Co.*, 792 F. 2nd 532, 540-41 (7th Cir. 1986).

Here, more than a scintilla of evidence existing [sic] to support each of these elements. Concerted activity, and the over acts that followed therefrom (Quikut's refusal to distribute the Motosko slicer and its later refusal to sell its AN 800 knives to demonstrators that did sell that slicer), are discussed above. And, from such conduct, the existence of specific intent may be inferred. *National Association of Pharmaceutical Manufacturers, Inc. v. Ayerst Laboratories*, 850 F. 2nd 904, 915 (2nd Cir. 1988); *Richter Concrete Corporation v. Hilltop Concrete Corporation*, 691 F. 2nd 818 (6th Cir. 1981).

Accordingly, the jury should be permitted to render a verdict on Plaintiff's Section 2 Conspiracy to Monopolize claim.

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully submits that the Court should, upon reconsideration, vacate its directed verdict dismissing Plaintiff's antitrust claims.

Respectfully Submitted,

/s/ Michael Morley
MICHAEL MORLEY - 0021154
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

A copy of the foregoing Motion was hand delivered this 5th day of October, 1992, to RICHARD E. GUSTER, ESQ., 50 South Main Street, Akron, Ohio 44308; and GEORGE W. ROONEY, ESQ., 75 East Market Street, Akron, Ohio 44308.

/s/ Michael Morley
MICHAEL MORLEY - 0021154
Attorney for Plaintiffs

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SILVER CLOUD, INC.,	)	
Plaintiff,	)	
vs.	)	Civil Action No.
NATIONAL KITCHEN PRODUCTS, et al., and QUIKUT DIVISION OF SCOTT FETZER CO.	)	1:89CV1729
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE HONORABLE SAM H. BELL, JUDGE OF SAID COURT, ON WEDNESDAY, SEPTEMBER, 30, 1992 AT 5:30 O'CLOCK P.M.

APPEARANCES:

For the Plaintiff:	MICHAEL MORLEY, ESQ. 721 Boardman-Poland Road Youngstown, Ohio 44513-3965
For the Defendant Quikut:	RICHARD E. GUSTER, ESQ. Thompson, Hine & Flory 50 S. Main Street Akron, Ohio 44308
For the Defendant National Kitchen Products:	GEORGE W. ROONEY, JR. Roetzel & Andress 75 E. Market Street Akron, Ohio 44308

Court Reporter: Richard G. DelMonico
U.S. District Court
2 South Main Street -
Room 588
Akron, Ohio 44308
(216) 535-1823

[p. 2] THE COURT: This case has been difficult in many respects because it has posed problems, in my mind, in a number of areas. So let me state these matters to you for the purpose of the record, and then we can go from there.

The court has considered the arguments of counsel concerning the motions made for judgment at the completion of all the evidence to be produced in this case. As to the claim of contract violation brought by the plaintiff against defendant Quikut, the motion is denied.

As to the anti-trust contentions brought by the plaintiff against defendants Quikut and Morris, the motions are sustained.

Two common elements are inherent in each of the claims brought under the powere [sic] of the anti-trust violation sections. One pertains to proof of a conspiracy either to monopolize the market or restrain trade; and the other implicates questions inherent in the necessity of proving relevant market.

Because I cannot view the end result between Quikut and Morris, if any existed, as being driven by an intent to manipulate a market, I believe the issue of conspiracy to monopolize or restrain trade to be insufficiently proven to warrant its consideration by the [p. 3] jury.

To prove a party's intent to monopolize or restrain trade, one must prove such results to be the object or goal of the party's intent as expressed by the agreement in question. This includes the power to control prices or exclude competition from that segment of commerce.

Here we speak of competition generally and not such as involves but a single competitor. Because the evidence discloses here little or nothing about the nature and interplay of the slicer demonstration market, it would leave the jury in a position where it might only speculate as to the intent because it would be unable to define either of the goals spoken of.

As to relevant market, I believe the evidence or lack of evidence offered places the court in a position of saying that it, the evidence, is insufficient to preclude the jury from arriving at a verdict based on speculation alone, rather than a rationale consideration of fact and opinion upon which a verdict could be predicated on this issue.

No testimony was offered concerning a meaningful quantification of the market, its size, its nature, its functional interplay with the product choices, price, method of sale and other factors.

[p. 4] From the evidence offered it is my opinion that the jury would be unable to determine relevant market as to both product and geographic areas. More specifically, there is no evidence which would allow the trial jury to do more than speculate on the issue of market power, a key ingredient in the analysis required by the determiners of fact.

I would add that as to the conspiracy to restrain trade claim, the jury cannot, on the basis of the evidence adduced, conclude that the conspiracy, if it existed, produced substantial adverse anti-competitive effects.

For this reason, then, I believe the rationale answer is that the claims against Mr. Morris are dismissed. There is a remaining claim of contract violation, I believe, against Quikut.

I should add, incidentally, that I find no evidence in the record which impacts on my thought that damage was done to Mr. Motosko as the holder of the patent. I have viewed that, as I indicated to you, as a property right and none of the evidence here would indicate to me that that, as a right, has been effective.

So we'll see you, some of you tomorrow morning, is that correct?

MR. GUSTER: That's correct. 9:00 o'clock,

APPENDIX E

Partial Transcript of Proceedings, October 1, 1992

[p. 13] because I want to review it.

You have seen it?

MR. MORLEY: Yes.

MR. GUSTER: I would be glad to do that. And then in your absence we can just list the exhibits to the reporter.

THE COURT: Yes, that will be swell. And whatever they agree on there, I'll admit into the record. And we'll see you on Tuesday.

MR. MORLEY: I know you are running to Cleveland.

THE COURT: It's okay.

MR. MORLEY: It's my intention on the court's ruling, to file a motion for reconsideration on the court's decision as of yesterday.

THE COURT: Yes.

MR. MORLEY: If I do that, I will do that shortly, certainly by Monday at 8:30 in the morning at the latest. Because if the court were to reconsider, I think that there is a jury that's waiting to be called and George Rooney would have to be involved as well. And I wanted the court to be aware of that among other things, we believe that a horizontal inquiry should be made as a result of the fact that Quikut and Morris, apparently in the court's view, were manufactures [sic] and thus horizontal [p. 14]

inquiry should be made. But various reasons will be set forth.

My client does want –

THE COURT: You mean now as opposed to before? Because we did make that inquiry previously, you recall.

MR. MORLEY: Yes, your Honor, I understand that. And that will not be the primary trust of the motion for reconsideration frankly.

THE COURT: Well, there is another issue so we are all sure then, we now have these pending claims, state claims. I assume there is no objection to my going forward with the contract claim.

MR. MORLEY: I don't have an objection with the court going forward with the contract claim, of course. But I would like the court to consider the motion for reconsideration before that.

THE COURT: Oh no, I'm not saying that.

MR. MORLEY: I'm sorry.

THE COURT: The jurisdiction of the court now is a question by reason of the rulings.

No, if there is one thing I've attempted to do in this case is give full consideration to everything you folks have said, and I most assuredly will do that again.

But strategically, sometimes this is a problem and I want to throw it out to you because – so you know [p. 15] what it is.

MR. MORLEY: I don't have a problem with this proceeding and doing it here at this point.

Do you have –

MR. GUSTER: Well, I normally don't like to consent to jurisdiction in any circumstance and –

THE COURT: I'm not asking you to consent to anything. We have gone this far, I'll finish the case. If there is some reason why I should not, that may change Mike's view as to how he proceeds, because certain things here have not yet been done. I don't want to belabor the point, I'm just raising the issue now so that its part of the record. Because theoretically I could not try these alone without the aegis of the anti-trust federal jurisdiction.

MR. GUSTER: The justification, of course, for the contract claim was the pending or ancillary jurisdiction of the court.

THE COURT: Well, I think it was. I think it was.

MR. GUSTER: It was so alleged and I think that's the classic situation. That's the only justification for the state claim.

MR. MORLEY: That's how it was alleged.

MR. GUSTER: And especially so because of